OPEN MEETINGS:

BEST PRACTICES GUIDE FOR LOCAL GOVERNMENTS

Ombudsperson
B.C.'s Independent Voice For Fairness

Special Report No. 34 | SEPTEMBER 2012
to the Legislative Assembly of British Columbia

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FROM THE OMBUDSPERSON

Municipal law was changed to require that municipal governments hold meetings that are open to the public, in order to imbue municipal governments with a robust democratic legitimacy. The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law.

The Supreme Court of Canada in *London (City) v. RSJ Holdings Inc.*[1]

One of the cornerstones of open and transparent government in British Columbia is the requirement for local governments to conduct meetings that are open and accessible to the public. Providing citizens with the opportunity to observe and engage their elected representatives fosters trust and confidence in decision-making processes and allows for meaningful participation and contribution from informed citizens. Open meetings act as venues for education and enable both elected officials and members of the public to make more fully informed decisions.

In the course of investigating and evaluating complaints concerning the implementation of open meeting provisions in the *Community Charter* and receiving information from local governments, we became aware of some common challenges as well as effective ways of addressing them.[2]

This guide grew out of an interest in sharing some of that information in order to help local governments comply with statutory requirements, to improve consistency in practice as well as to showcase the best practices for local governments to follow when fulfilling their open meeting requirements. At the heart of these best practices are the same values that the Office of the Ombudsperson strives to uphold: openness, transparency, and accountability. We promote and uphold these values because they are essential to ensuring that citizens are treated fairly and reasonably by public authorities.

This guide grew out of an interest in sharing information to help local governments comply with statutory requirements and to showcase best practices to follow in fulfilling open meeting requirements.

This guide:

1. Outlines the history of local government open meeting laws and includes comments on the law in force today;
2. Clarifies what constitutes a "meeting" in order to assist local governments to identify the circumstances in which the open meeting laws apply;
3. Outlines best practices implemented by local governments to ensure accountability and transparency; and
4. Contains a checklist based on best practices to assist local governments in fulfilling their open meeting obligations.

I hope that the guide will help to address uncertainties surrounding the open meeting requirements in British Columbia and that it will assist local governments in following both the letter and spirit of the open meeting laws.

Kim J. Carter

Kim Carter
Ombudsperson
Province of British Columbia

[1] *London (City) v. RSJ Holdings Inc.*, 2007 S.C.C. 29 at para 38, [2007] 2 SCR 588.

[2] *Community Charter*, S.B.C. 2003, c. 26 (*Community Charter*).

THE LEGAL FRAMEWORK FOR OPEN AND CLOSED MEETINGS

There is a presumption under the *Community Charter* that meetings of local government boards and councils will be open to the public. Sometimes, in order to preserve confidentiality in respect of private matters, meetings may be closed. However, as this runs contrary to the principles of openness, transparency and accountability, statutory provisions are in place that limit the circumstances under which local governments can hold closed meetings and ensure appropriate procedures are followed prior to the closure of a meeting. This part of the guide outlines the legislative history and current laws pertaining to open and closed meetings in B.C.

Municipalities, regional districts,[3] the Islands Trust[4] and other bodies identified in section 93 of the *Community Charter* are subject to the open meeting provisions contained in Division 3 of Part 4.[5] Throughout this guide, these entities are referred to collectively as "local governments".

Improvement districts, which include irrigation, waterworks, fire protection and dyking districts, are not subject to the open meeting provisions contained in Division 3 of Part 4 of the *Community Charter*. However this does not mean that improvement districts are under no obligation to meet openly, and at the end of this report we discuss separately the law with respect to improvement districts.

...statutory provisions are in place that limit the circumstances under which local governments can hold closed meetings and ensure appropriate procedures are followed prior to the closure of a meeting.

Legislative History

While historically there was no clear common law obligation for local governments to hold open meetings, for more than 130 years there have been statutory legal requirements in B.C. that local government meetings be open to the public.

The first open meeting requirement in British Columbia was introduced in the *Municipalities Act* of 1881,[6] which was later renamed the *Municipality Act*, the *Municipal Act*, and finally the *Local Government Act* in 2000.[7] While the wording varied slightly over time, the original open meeting requirements remained largely unchanged until 1999. They stated that:

- regular meetings must be open to the public;
- special meetings could be closed by resolution when the council determines that was in the public interest; and
- individuals could be excluded for improper conduct.

[3] Division 3 of Part 4 of the *Community Charter* applies to regional districts through s 793(7) of the *Local Government Act*, R.S.B.C. 1996, c. 323.

[4] Division 3 of Part 4 of the *Community Charter* applies to the Islands Trust Council, the executive committee, local trust committees and the trust fund board through s 11 of the *Islands Trust Regulation*, B.C. Reg. 469/2003.

[5] The City of Vancouver is subject to a statute entitled the *Vancouver Charter* that contains open meeting requirements almost identical to those in the *Community Charter*. Accordingly, the material covered in this guide is applicable to the City of Vancouver, *Vancouver Charter*, S.B.C. 1953, c 55 ("*Vancouver Charter*").

[6] *Municipalities Act*, S.B.C. 1881, c 16.

[7] *Local Government Act*, R.S.B.C. 1996, c 323.

Bill 88, the *Local Government Statutes Amendment Act*, was passed in 1999.[8] It set out ten circumstances where a meeting could be closed to the public[9] and stated that a meeting must be closed where the subject matter relates to:

- a request under the *Freedom of Information and Protection of Privacy Act* if the council is designated as head of the local public body for the purposes of that Act in relation to the matter; or
- a matter that, under another enactment, is such that the public must be excluded from the meeting.[10]

In 2003, the *Community Charter* was passed. It repealed and replaced some sections of the *Local Government Act*, including the provisions regarding open and closed meetings. However, the content of the *Community Charter* provisions respecting open and closed meetings borrowed heavily from the *Local Government Act*. The open meeting provisions enacted in 2003 remain in force today.

Current Open Meeting Requirements for Local Governments

Subsection 89(1) of the *Community Charter* sets the general rule for local government meetings in B.C. which is that: meetings must be open to the public unless expressly authorized to be closed by the legislation. The bodies to which this rule applies are set out in section 93 and include elected councils, advisory bodies and boards of variance.

Local governments ensure the openness and accessibility of meetings in various ways. Often meetings are held at a regular time and place, in a readily accessible location such as a council chamber or other room in a public building. For interested members of the public who are unable to attend in person, local government meetings may be broadcast on local cable television, or more recently, may be streamed over the internet to allow access to proceedings from individual computers.

When any of the bodies listed in section 93 of the *Community Charter* decide to close a meeting to the public, they can only do so in accordance with section 92. Section 92 requires local governments to pass a resolution containing two things:

1. The resolution must state that a meeting or part of a meeting is to be closed; and
2. The resolution must state the reason for closing the meeting.

The circumstances under which a meeting may or must be closed are found in section 90 of the *Community Charter*. Subsection 90(1) lists 15 circumstances when a meeting may be closed, while subsection 90(2) lists five circumstances when a meeting must be closed. Only the subjects identified in section 90 may be discussed in a closed meeting, as all other topics are governed by the open meeting requirement in subsection 89(1).

While some topics may or must be discussed in a closed meeting, the actions local governments can take on the topics are limited. Specifically, subsection 89(2) prohibits voting on the reading or adoption of a bylaw during a closed meeting.

Many of these legislative requirements are straightforward and applied consistently across the province. However, some areas have resulted in inconsistent practices and could benefit from clarification.

When local governments decide to close a meeting to the public, they must do so in accordance with section 92. Section 92 requires local governments to pass a resolution containing two things:

1. *The resolution must state that a meeting or part of a meeting is to be closed; and*
2. *The resolution must state the reason for closing the meeting.*

[8] *Local Government Statutes Amendment Act*, S.B.C. 1999, c 37.

[9] *Municipal Act*, R.S.B.C. 1996, c 323 s 242.2(1) [Municipal Act].

[10] *Municipal Act*, s 242.2(2).

WHAT IS A MEETING?

In order to comply fully with the open meeting legislation and follow best practices, it is important to know when they apply. The *Community Charter* does not define the word "meeting" for the purposes of the open meeting requirements, so local governments are sometimes unsure about when an informal gathering is in fact a meeting subject to the open meeting requirements.

Dictionary and other definitions, while helpful, cannot always account for the context or nuances that exist within local government gatherings. In contacts with local governments, one of the most frequent challenges identified was determining the point at which a gathering becomes a meeting.

There are several factors that should be considered by local governments when they are determining whether their gathering is indeed a meeting and is subject to the open meeting requirements. The Ministry of Community, Sport and Cultural Development provides useful information on this topic on its website. It states that some courts have determined "a council meeting is any gathering to which all members of council have been invited; and that is a material part of council's decision-making process."[11] Accordingly, "[c]ouncil gatherings where all council members could be seen to be making decisions, or moving towards making decisions, would meet this two-part definition."[12]

The Nature of the Group

The composition of any gathering is one of the two key factors in determining whether the gathering is a meeting. The presence of a quorum or the full membership of a council or other body is more likely to constitute a meeting, while a gathering of smaller groups will be less likely to constitute a meeting. Recognized groups, such as committees, are more likely to have their gatherings regarded as meetings than random congregations of elected officials. Similarly, groups that exercise a decision-making authority are more likely to have their gatherings considered meetings than groups who study issues or recommend action.

The Nature of the Discussion

The other key factor in determining whether a gathering constitutes a meeting, and is therefore subject to the open meeting requirements, is the nature of the discussion. This depends on whether a gathering involves discussing matters within a local government's jurisdiction[13] in a capacity that deprives the public of "the opportunity to observe a material part of the decision-making process".[14] Any real progress in the decision-making process of a matter within the local government's jurisdiction strongly indicates that a gathering is a meeting. This does

[11] Ministry of Community, Sport and Cultural Development. *Community Charter-Open Meetings* online: Ministry of Community, Sport and Cultural Development http://www.cscd.gov.bc.ca/lgd/gov-structure/community_charter/governance/open_meetings.htm.

[12] Ministry of Community, Sport and Cultural Development. Community Charter-*Open Meetings* online: Ministry of Community, Sport and Cultural Development http://www.cscd.gov.bc.ca/lgd/gov_structure/community_charter/governance/open_meetings.htm.

[13] *Southam Inc v. Hamilton-Wentworth (Regional Municipality) Economic Development Committee* (1988), 66 OR (2d) 213, 54 DLR (4th) 131 (CA) at para 135 [*Hamilton-Wentworth* cited to DLR].

[14] *Southam Inc., Eade and Aubry v. Council of the Corp. of the City of Ottawa et al.*, [1991] OJ No. 3659 (QL) at para 12 (Ont Div Ct) [*Southam Inc. v. Ottawa Council*]

not necessarily mean however that if progress towards a decision is not made that the gathering is not a meeting. It may still be one if the meeting was for that purpose even though the desired progress or result was not achieved.[15]

The Nature of the Gathering

Where and how a meeting is conducted are less significant but relevant factors in determining whether a gathering is a meeting. Generally speaking, if a gathering shares some of the common features of a regular meeting, this may indicate that the gathering is in fact a meeting.[16] For example, gatherings that occur regularly are more likely to be seen as meetings, as are gatherings that are planned in advance.

Procedural matters can also strongly indicate whether a gathering is a meeting. Gatherings that follow an order of proceeding, obey rules of order, have an agenda, or record minutes are more likely to be meetings, and the presence of a chair or corporate administrator is also indicative of a meeting.[17]

Gatherings that are held at a local government body's normal meeting place are more likely to be seen as meetings. However, even if the meeting location is irregular, gatherings in areas completely under the control of the group — such as a private meeting room — will be more likely seen to be meetings than those held in open, public settings.

A vote of any sort indicates that a gathering is in fact a meeting.[18] The "heart of the matter" cannot be seen to have been decided at a gathering, shielded from the view of the public.[19] Instead, local governments should allow for public discussion and consideration of the matter before holding any final vote.[20]

"Workshops" and "Shirt Sleeve Sessions" Can Be Meetings

Some councils gather outside of scheduled meetings for training, planning, briefings or other purposes. These events can be referred to as workshops, shirt sleeve sessions, retreats, or by other terms. There can be uncertainty about whether these informal gatherings are in fact meetings that should be held in public.

It is not possible to exhaustively define workshops, shirt sleeve sessions and the other terms commonly attached to less formal gatherings or to make generalizations about whether open meeting requirements apply to them. A gathering, whether called a workshop, a shirt sleeve session or something else, can be a meeting.

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15 André Marin, "'Don't Let the Sun Go Down on Me: Opening the Door on the Elton John Ticket Scandal': Investigation into the City of Greater Sudbury Council Closed Meeting of February 20, 2008", (ON: 2008) online: Ombudsman Ontario http://www.ombudsman.on.ca/Files/sitemedia/Documents?Newsroom?Press%20Releases/dont_let_the_sun_sudbury_04252008.pdf.

16 See, for examples, *City of Yellowknife Property Owners Assn. v. Yellowknife (City)*, [1998] NWTJ No. 74 at para 12 (NWTSC) [*City of Yellowknife*]; *Hamilton-Wentworth, supra* note 13 at 136.

17 See, for example, *City of Yellowknife, Ibid.*

18 *City of Yellowknife, supra* note 16 at paras 17 and 19.

19 *3714683 Canada Inc. v. Parry Sound (Town)*, [2004] OJ No. 5061 at para 66 (Ont SCJ).

20 *London (City) v. RSJ Holdings Inc.*, 2007 S.C.C. 29, [2007] 2 SCR 588.

A gathering is more likely a meeting if the attendees are discussing matters that would normally form the basis of the council's business and dealing with the matters in a way that moves them toward the possible application of the council's authority.

A gathering is less likely a meeting if:

- there is no quorum of board, council or committee members present
- the gathering takes place in a location not under the control of the council or board members
- it is not a regularly scheduled event
- it does not follow formal procedures
- no voting occurs and/or
- those in attendance are gathered strictly to receive information or to receive or provide training

A gathering is more likely a meeting if:

- a quorum of council, board or committee members are present
- it takes place at the council or board's normal meeting place or in an area completely under the control of the council or board
- it is a regularly scheduled event
- formal procedures are followed
- the attendees hold a vote and/or
- the attendees are discussing matters that would normally form the basis of the council's business and dealing with the matters in a way that moves them toward the possible application of the council's authority

ELECTRONIC MEETINGS

Electronic communication has allowed local governments an unprecedented level of flexibility and connection. Communication without the need to meet in person is now a more accessible alternative than ever before, and many local governments have embraced this accessibility to foster a stronger dialogue with their citizens. However, electronic communication also presents specific challenges to transparency and accountability, and local governments must be aware of how electronic communication relates to the open meeting requirements in the *Community Charter*.

Recognizing Electronic Meetings

The most important thing for local governments to recognize is that the same key factors determining whether an informal gathering is a meeting also apply to electronic communications. If members of a local government are, through electronic communications, advancing matters within their jurisdiction, all of the rules about open meetings apply. For example, the content of instant messaging and group emails between local government members, whether the emails are sent from or to public or private accounts, may unwittingly transition from topics that do not need to be discussed in an open meeting to matters that must be discussed in an open meeting. Local governments need to be conscious that all meetings of council members, not simply those that take place in an official setting, are subject to the open meeting requirements.

Holding Electronic Meetings

Section 128 of the *Community Charter* which governs electronic meetings applies only to municipal councils and council committees; however, similar provisions also exist for Regional Districts [21] and the Islands Trust.[22] Section 128 states that a procedure bylaw may authorize a local government to participate in electronic meetings in two ways. First, a local government may hold a special meeting electronically. Second, a member of council or a council committee that is unable to attend a council or committee meeting may participate in the meeting electronically.

The authority to hold electronic meetings is subject to several limitations. Electronic meetings are permitted only if:

- authorized by and conducted in accordance with the applicable procedure bylaw
- facilities enable the meeting's participants to hear, or watch and hear each other
- facilities enable the public to hear, or watch and hear, the meeting and the participation of any members joining an in-person meeting by electronic means, and
- notice of a special meeting conducted by electronic means includes a description of the way in which the meeting will be conducted, as well as the place where the public may attend to hear the parts of the meeting that are open to the public

[21] *Regional Districts Electronic Meetings Regulation*, B.C. Reg. 271/2005.

[22] *Islands Trust Electronic Meetings Regulation*, B.C. Reg. 283/2009.

It is best practice for electronic meetings to occur only when meeting in person is impossible or impractical. For example, special meetings may need to be held with only the requisite 24 hours advance notice, and electronic communication can provide a relatively quick way to connect participants, especially in geographically larger jurisdictions where travel to a central meeting location might be difficult for some. Similarly, if a councillor, trustee or director is unable to be physically present with the group, electronic communication can allow her or him to participate in a meeting that would otherwise be missed.

Given the flexibility inherent in the general provisions outlined in section 128, it is useful for local governments to clearly outline under what circumstances and how electronic meetings will be conducted. Some local governments have decided to develop a specific bylaw to address electronic meetings,[23] while many others have included briefer electronic meetings sections in their general procedure bylaw.[24] The Ministry of Community, Sport and Cultural Development has provided a checklist of considerations that local governments should address when drafting their electronic meeting procedures.[25]

... it is useful for local governments to clearly outline under what circumstances and how electronic meetings will be conducted. Some local governments have decided to develop a specific bylaw to address electronic meetings, while many others have included briefer electronic meetings sections in their general procedure bylaw.

[23] See, for example, City of Fort St. John, Council Policy No. 96/03, *Electronic Meetings and Participation by Members*, online: City of Fort St. John http://www.civicinfo.bc.ca/Library/Policies_and_Procedures/Elected_Officials_and_Council_Meetings/Electronic_Meetings_and_Participation_by_Members_Policy--Fort_St._John--January_2004.pdf.

[24] See, for example, City of Pitt Meadows, Procedure Bylaw No. 2456, 2010, *A Bylaw of the City of Pitt Meadows to set Council Procedure*, online: City of Pitt Meadows http://www.pittmeadows.bc.ca/assets/Bylaws/2456__2010_-_Procedure_Bylaw.pdf.

[25] Ministry of Community, Sport and Cultural Development, *Community Charter-Electronic Meetings*, online: Ministry of Community, Sport and Cultural Development http://www.cscd.gov.bc.ca/lgd/gov_structure/community_charter/governance/open_meetings.htm.

COMPLYING WITH THE OPEN MEETING RULES – BEST PRACTICES

As set out previously, the best way to ensure compliance with the open meeting rule is to regularly hold open, accessible public meetings. There are however situations where local governments must or may hold a closed meeting. In these situations, which are exceptions to the open meetings rule authorized by statute, the best way to continue to comply with both the letter and intent of that rule is to carefully consider whether a meeting needs to be closed and carefully follow all procedural rules if that is the case.

Public Notice of Meetings

Providing clear, conspicuous and adequately detailed advance public notice of meetings is an important first step in ensuring openness and transparency. While the same statutory notice requirements do not apply to all local governments, the underlying principles and best practices discussed here do.

Section 127 of the *Community Charter* sets minimum requirements with respect to notice of meetings. Section 127 applies to municipalities, and key parts of the section also apply to the Islands Trust.[26]

Local government bodies, including regional district boards, municipal councils and the Islands Trust Council[27] are required under section 124 of the *Community Charter* or section 794 of the *Local Government Act* to adopt procedures bylaws that must provide for advance public notice of the time, date and place of council, board or committee meetings. In some cases procedures bylaws must, and in other cases should, identify the places where public notices of meetings are to be posted.

Under section 127 of the *Community Charter*, municipal councils must at least once each year make available to the public a schedule of the date, time and place of regular council meetings. With one exception discussed below, section 127 requires municipal councils and the Islands Trust Council to provide at least 24 hours advance public notice of the date, time and place of special meetings. Section 127 requires that notice of special meetings be posted at the regular meeting place as well as at the public notice posting places established by bylaw. Some procedures bylaws include the local government's website as a public notice posting place. As people turn to the internet more frequently for information, it is useful for local governments to post meeting notices and agendas on their websites, regardless of whether this is required by their procedures bylaws. Some local governments have gone further by enabling members of the public to subscribe to an e-mail service through which they will receive automatic notification of all council meetings.

It should be emphasized that section 127 of the *Community Charter* also specifically requires that notice of special meetings, including those that may be closed to the public, provide a description in general terms of the meeting's purpose. Some regional districts have incorporated similar requirements into their procedures bylaws. A requirement to provide some degree of disclosure, even in instances where a meeting will be closed to the public, reflects the overarching objective of ensuring as much openness and accountability as possible in all cases.

In general, the spirit of the open meeting provisions will be satisfied most effectively if local governments avoid regularly scheduled closed meetings. Instead, it is preferable to close part of a regular council meeting if the subject matter being considered is or relates to one of the specific exemptions in s. 90, and there are compelling reasons to close the meeting.

[26] Section 127 (2) and (3) other than subsection 2(b) of the *Community Charter* apply to the Islands Trust under section 11(2) of the *Islands Trust Regulation*.

[27] Section 794 of the *Local Government Act* applies to the Islands Trust under section 11(3) of the *Islands Trust Regulation*.

Some local governments have demonstrated their commitment to openness in special meeting notices by providing clear and adequately detailed information about the matters to be discussed, rather than simply including a reference to the paragraph in section 90 that authorizes the closure of a meeting.

Municipal councils will sometimes hold a closed meeting immediately in advance of a regular meeting. If a council chooses to do so, a separate meeting notice in accordance with the requirements of subsection 127(2) of the *Community Charter* must be provided in the same way as for any other special council meeting. If part of a regular council meeting is closed to the public, or the closed portion of a council meeting occurs at the end of a meeting, a separate notice is not required. However, it is best practice to specify on the meeting agenda if a part of the meeting is expected to be closed to the public.

There are other considerations that should also inform a local government's decision about when to schedule a closed meeting. Section 92 of the *Community Charter* requires that before holding a closed meeting, councils and boards must pass a resolution to that effect in a public meeting. While there may be practical advantages to scheduling a closed session in advance of a regular meeting, this can be done only if the resolution to close the meeting is carried out in an open meeting. The *Community Charter* does not require the authorizing resolution to be passed immediately before the closed meeting; however, it must be done in public in advance of the meeting.

As people turn to the internet more frequently for information, it is useful for local governments to post meeting notices and agendas on their websites, regardless of whether this is required by their procedures bylaws. Some local governments have gone further by enabling members of the public to subscribe to an e-mail service through which they will receive automatic notification of all council meetings.

Best Practices for Providing Public Notice

Best practices with respect to notice of meetings include:

- posting meeting notices with sufficient and specific information to enable an understanding of the purpose of the meeting and the matter(s) to be discussed
- posting notices of meetings and agendas on websites in advance of meetings
- providing the option for members of the public to subscribe to an e-mail service and receive automatic notice of all meetings
- providing more than the minimum 24 hours advance notice of special meetings
- using the special authority to waive notice only when the urgency of the matter or other circumstances clearly require that action, and documenting the reasons

In general, the spirit of the open meeting provisions will be satisfied most effectively if local governments avoid regularly scheduled closed meetings. Instead, it is preferable to close part of a regular council meeting if the subject matter being considered is or relates to one of the specific exemptions in s. 90, and there is a clear rationale to close the meeting.

Subsection 127(4) allows for the waiver of notice of a special meeting by unanimous vote of all council members.[28] The vote to waive notice must be carried out in advance of the meeting, as waiver of the notice cannot be done retroactively. The authority to waive notice is usually used where there is an emergency and a meeting must be held without delay. However, it has also been used to discuss annual budgets and other topics, where the need to waive notice is not as clear.

[28] Section 11(2) of the *Islands Trust Regulation* does not extend this authority to the Islands Trust Council.

Although section 127 does not set limits on the grounds upon which notice may be waived, municipal councils should be careful to use this authority sparingly. If notice is waived, it is best practice to document the reasons for the waiver so the public is assured that notice was reasonably waived.

Closing a Meeting

The decision to close a meeting to the public should not be made hastily or without careful consideration of the principles and values that underlie the open meeting provisions in the *Community Charter*.

In many cases, there may be some uncertainty or disagreement as to whether it is appropriate or necessary to close a meeting to the public. Paragraph 90(1)(n) of the *Community Charter* authorizes the closure of a meeting to determine whether it is necessary to discuss a particular matter in a closed meeting. Use of this provision to allow discussion and debate is an effective way of ensuring that meetings are not improperly closed to the public.

Resolutions to Close a Meeting

Once a local government has decided that a subject should be discussed in a closed meeting, the procedural requirements in section 92 of the *Community Charter* must be followed. Section 92 states that a local government must pass a resolution in an open meeting before closing a meeting or part of a meeting.

Once a local government has decided that a subject should be discussed in a closed meeting, the procedural requirements in section 92 of the Community Charter *must be followed.*

This resolution must include two things and should include a third. It must state:

1. That a meeting or part of a meeting is to be closed, and
2. The reason for the decision to close the meeting.

It should also reference the specific paragraph of section 90 that authorizes the closure.

In practice, while resolutions consistently state that a meeting or part of it is to be closed with reference to the authorizing paragraph of section 90, the basis for the decision is not always specifically stated. Local governments should provide as much detail as possible about the basis for closing the meeting without undermining the reason for closing the meeting in the first place. This will help to limit speculation, increase public trust and enhance the credibility of the local government.

While the *Community Charter* does not stipulate that each reason for closing a meeting to the public must be included in the resolution, or even that the primary reason must be the one that is included, the courts have said it is "disingenuous" to pass a resolution to close a meeting for one stated purpose and then discuss unrelated matters in the same closed meeting.[29]

Two positive practices should be considered when a meeting is being closed. First, it is helpful when local governments read the resolution to close the meeting aloud. This ensures that those in attendance at the open meeting are informed of the basis and the authority for the resolution.

In addition, it is useful for local governments to inform those in attendance whether council intends to reconvene in an open meeting following the conclusion of the closed meeting. If there are plans to reconvene, informing attendees of the expected

[29] *Barnett v. Cariboo (Regional District)* 2009 BCSC 471 at para 31.

duration of the closed session is also a good idea. This allows members of the public to make informed choices about whether they wish to stay and participate in the subsequent open portion of the meeting.

Best Practices (Closing a Meeting)

Best practices with respect to closing a meeting include:

- using paragraph 90(1)(n) if there is reason to question whether it is necessary to close a meeting
- providing as much detail as possible about the basis for closing the meeting without undermining the reason for closing the meeting
- including in the resolution to close a meeting a description of each distinct matter to be discussed and the authorizing provision
- reading the resolution to close a meeting aloud
- stating whether council will reconvene in an open meeting at the end of the closed session

Section 90 of the Community Charter

Most of the open meeting exceptions in section 90 are straightforward. However, some can benefit from clarification.

Subsection 90(1) lists 15 circumstances in which a council may exercise its discretion to close a meeting. The fact that those provisions are discretionary means it is not sufficient that a matter to be discussed is covered by one of the paragraphs of subsection 90(1). That is only the starting point of the decision making process. Once satisfied that the requirements of one or more of the paragraphs in subsection 90(1) are met and a closed meeting may be held, councils must then consider whether the meeting should be closed.

Generally, it will be appropriate to close a meeting where discussion of a subject in an open meeting raises a reasonable and identifiable possibility of damage to the interests of the local government, the public, or a third party.

This approach is consistent not only with legislation but the underlying principles of openness and transparency of the legislation which is that wherever possible, meetings should be open and accessible to the public.

Paragraphs 90(1)(e), (f), and (k)

These paragraphs provide conditional authority for closed meeting discussion concerning law enforcement, the provision of municipal services and land acquisition, disposition or expropriation. However, this authority may be exercised only if it is determined that discussion of the matter could reasonably be expected to harm either the conduct of the investigation, the enforcement of an enactment or the interests of the municipality. In *Local Government under the Community Charter* 4th ed., William Buholzer proposes that use of these provisions requires local governments to "first make an express determination (by resolution) that such discussion would be harmful, and then adopt a resolution to deal with the matter in the absence of the public". The Ministry of Community, Sport and Cultural Development takes a consistent approach.

Paragraph 90(1)(g)

Paragraph 90(1)(g) authorizes the closure of a meeting to discuss subject matter that is or relates to litigation or potential litigation affecting the local government. One of the challenges is to not interpret "relates to" and "potential litigation" so broadly that it includes almost any controversial issue, as that would not advance the principles of openness and transparency.

Factors that might indicate appropriate use of this paragraph include:

- a specific threat of litigation, or
- advice from legal counsel that indicates there is a likelihood of litigation and that the local government's interests may be prejudiced by public discussion

On the other hand, where potential for litigation appears to be remote or speculative, use of this paragraph is unlikely to be appropriate.

Paragraph 90(1)(j)

Paragraph 90(1)(j) provides the authority to close a meeting for discussion of information that would be protected in document form under section 21 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and there is a strong presumption that any information protected under FIPPA should be discussed in a closed meeting. Paragraph 90(1)(j) is an unusual provision in that it requires local governments to review whether information, if in record form, could be disclosed under section 21 of FIPPA. If the information would be protected, they must then determine whether consent has been given for the release of the information.

Section 21 of FIPPA prohibits the disclosure of information gathered for the purpose of determining tax liability or collecting a tax, as well as information that would or could reasonably be expected to harm the business or financial interests of a third party. Examples include information that would reveal trade secrets, harm the competitive position of a third party or result in any undue financial loss to any person. The prohibition on discussion does not apply however if the affected third party has consented to the disclosure.

Paragraph 90(1)(l)

Paragraph 90(1)(l) states that a meeting may be closed for discussions related to "municipal objectives, measures and progress reports", but only if those discussions are for "the purposes of preparing an annual report under section 98". Because authority under this paragraph is limited to discussion for the purpose of preparing an annual report, the inference is that other meetings with municipal officers and employees for discussing municipal objectives, measures and progress reports will be done openly.

Paragraph 90(1)(m)

Paragraph 90(1)(m) provides authority to close a meeting if the closure is authorized by another enactment. It was established with a view to future enactments. Currently there does not seem to be any enactment that would justify its use.[30]

[30] Discussion with Ministry of Community, Sport and Cultural Development staff, 2011.

Paragraph 90(1)(n)

This paragraph is used to discuss whether a meeting should be closed under another subsection of section 90. Its use is limited to that discussion and no details of specific subject matter should be debated. Once a decision has been made that a specific subject matter should appropriately be discussed in a closed meeting, councils and boards must return to an open meeting to pass a resolution to do so. It is best practice for this subsection to be the primary way that local governments debate whether it is necessary to close a meeting to discuss a specific subject matter.

Subsection 90(2)

Subsection 90(2) requires councils to discuss certain subjects in closed meetings. Those provisions are straightforward for the most part and appear to be used relatively infrequently.

Paragraph 90(2)(b)

This paragraph authorizes a closed meeting for the express purpose of "the consideration of information received and held in confidence relating to negotiations" between the various levels of government and possible third parties. Accordingly, it is necessarily used in order for legitimate and specific negotiations to be discussed. It does not appear that this provision can be used as a means of holding a private meeting with visiting provincial or federal government officials in the absence of information related to a specific negotiation.

Conducting a Closed Meeting

During a closed meeting, local governments should be careful to discuss only subjects authorized by the resolution to close the meeting, the prohibition against voting on the reading or adoption of bylaws and the importance of keeping detailed minutes.

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Straying from Authorized Topics

During closed meetings, local governments should only be discussing subjects that were authorized by the resolution to close the meeting. The default presumption in subsection 89(1) is that all meetings are open to the public; the only authority to close a meeting is found in the specific paragraph(s) in section 90 identified in the resolution to close the meeting. If the conversation strays from the topic covered by the paragraph referenced in the resolution, the closed meeting may no longer be authorized. If a subject for discussion arises that is not covered by the resolution authorizing the closed meeting, local governments should table the item and discuss it when they return to an open meeting. If the subject is one requiring a confidential discussion, a new authorizing resolution may be passed in an open meeting.

Voting

Subsection 89(2) states that a local government "must not vote on the reading or adoption of a bylaw when its meeting is closed to the public". Contraventions of this subsection are uncommon. Local governments may however vote or pass resolutions on other matters in closed meetings. These resolutions may then be

revealed during an open meeting without a discussion of the factors, considerations, or reasons behind them. In other cases the resolutions to vote on other matters may not be made public for a prolonged period of time.

Sometimes the level of confidentiality afforded by closed meetings is necessary to pass resolutions that ensure the orderly functioning of the local government. Some matters must be discussed entirely in confidence. Passing resolutions in closed meetings however, can never be used to conceal the decision-making process from the legitimate gaze of the public. Indeed, local governments should always try to provide as much information as possible about any resolutions passed during closed meetings, including when possible, the considerations on which they were based.

This may result in a spectrum of disclosure that varies from decision to decision, this is perfectly acceptable. For example, the decision-making process for some resolutions may only require the withholding of a few specific details while the general factors, considerations, and reasons could still be disclosed. On the other hand, some resolutions may require the decision-making process to be completely withheld from the public. A determination of how much to disclose should be made on a case-by-case basis keeping in mind the importance of transparency.

Minutes

Local governments should record minutes for closed meetings in at least as much detail as open meetings and may wish to keep an electronic record as well. Minutes should include a detailed description of the discussion, any specific documents considered, any motions, resolutions or votes, and any directions issued. This will not only provide a reference for attendees, but, when the minutes are eventually released, will inform members of the public and reassure them that the matter was properly discussed in a closed meeting and that procedural requirements were satisfied. Under subsection 91(3), the minutes of a meeting or part of a meeting closed to the public must record the names of all persons in attendance.

Local governments should record minutes for closed meetings in at least as much detail as open meetings.

Best Practices (Conducting a Closed Meeting)

Best practices with respect to conducting a closed meeting include:

- restricting discussion to subjects that were authorized by the resolution to close the meeting
- whenever possible, avoiding passing resolutions in closed meetings
- keeping a detailed record of closed meetings

After a Closed Meeting

Following the conclusion of a closed meeting, careful consideration should be given to the release of minutes and other records that may have been generated during the closed meeting. As much information as possible should be released in order to achieve the goal of openness, transparency and accountability without compromising the interests of the local government, the public or a third party.

Release of Minutes and Other Records

Many subjects requiring the confidentiality of a closed meeting only require it for a limited period of time. Consequently, it is important that local governments have a process in place to regularly review the information produced at closed meetings. Information that would no longer undermine the reason for discussing it in a closed meeting should be released as soon as practicable.

Some local governments have acted proactively in this regard. They have assigned responsibility to specific staff for reviewing and releasing minutes of closed meetings and related information that no longer requires confidentiality. It is not only large and well-resourced local governments that have adopted this approach; smaller local governments have done so as well.

If it is not appropriate to release all information related to a closed meeting, it may be preferable to release incomplete information rather than to wait for a time when it will eventually be proper to release all the information. Local governments should strive to release as much information as possible as often as possible, in order to demonstrate their commitment to the principles of transparency and accountability and to receive the benefit of a more informed, engaged and trusting public.

Section 12 of FIPPA[31]

Closed meeting minutes may be excluded from disclosure under section 12 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).[32] Section 12 allows a local government to refuse to disclose information that would reveal the substance of deliberations of a closed meeting. It should be noted that if the information in question has also been discussed at an open meeting or is at least fifteen years old, the information is not protected from disclosure under FIPPA.

The test for invoking section 12 has three parts and places the onus of proof on the public body seeking to withhold the information. First, it must be shown that a meeting was held. Second, the public body must prove that the meeting was authorized to be closed. And third, the public body must establish that the disclosure would "reveal the substance of deliberations at that meeting".[33]

Information in minutes may be withheld under section 12 if it would reveal the substance of deliberations in a closed meeting, either directly or by enabling accurate inferences to be drawn. However, local governments must still retain information that cannot be disclosed and release the remainder of the record in accordance with subsection 4(2) of FIPPA. Normally the dates, times, locations, and names of attendees will not be protected by section 12, nor will the general subjects addressed in a closed meeting. Only information that, whether by itself or when combined with other publicly available information, reveals "the substance of deliberations" will be protected.[34] [35]

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[31] For complete information on the provisions of FIPPA, please go to the Office of the Information and Privacy Commissioners' website at http://www.oipc.bc.ca/.

[32] *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c 165.

[33] *City of Coquitlam* (14 May 2002), Order 02-19, online: Office of the Information and Privacy Commissioner http://www.oipc.bc.ca/orders/2002/Order02-19.pdf.

[34] *Inquiry Regarding Vancouver Police Board In Camera Meeting Minutes*, Order 00-14, online: Office of the Information and Privacy Commissioner http://www.oipc.bc.ca/orders/2000/order00-14.html.

[35] The Information and Privacy Commissioner is the final authority over matters under FIPPA.

Duty to Respect Confidentiality

Section 117 of the *Community Charter* imposes an obligation on councillors to maintain confidentiality in respect of information considered in a closed meeting.[36] Specifically, it requires that a council member or former council member must, unless specifically authorized by council, keep in confidence information considered in a lawfully closed meeting until that information has been discussed at an open meeting or otherwise released to the public.

The obligation under section 117 must be respected regardless of any individual opinion as to whether or not a matter should have been discussed in a closed meeting. It is also important to remember that any statements in this guide that encourage the release of information generated or discussed in a closed meeting applies to local governments as a whole and not to individual council members or other elected officials.

Best Practices (After a Closed Meeting)

Best practices with respect to actions after a closed meeting include:

- complying with the provisions of FIPPA
- establishing a process and assigning responsibility to specific staff for reviewing and releasing minutes of closed meetings and related information no longer requiring confidentiality
- releasing as much information as possible as often as possible once confidentiality is no longer required

[36] Section 117 of the *Community Charter* applies to Regional Districts under section 787.1 of the *Local Government Act*.

CURRENT OPEN MEETING REQUIREMENTS FOR IMPROVEMENT DISTRICTS

Improvement districts are not subject to the open meeting provisions contained in Division 3 of Part 4 of the *Community Charter*. In 2007, the *Local Government Act* was amended to provide the Minister with the explicit power to make those provisions apply to improvement district boards.[37] Although that authority has not been used to date, this does not mean that there are no legal or other obligations on improvement districts to meet openly in some circumstances.

Section 741 of the *Local Government Act* applies to improvement districts. That section requires that all annual general meetings of an improvement district be open to the public. The Act provides no discretion to close to the public all or a part of that meeting.

Section 739 of the *Local Government Act* requires the board of trustees of an improvement district to establish, by bylaw, procedures for calling and conducting meetings. The Ministry of Community, Sport and Cultural Development provides guidance to improvement districts about governance and standards, and it provides sample bylaws. A guide for improvement districts released in 2006 states:

> All board meetings should be open to the public and no person should be excluded except for improper conduct. Persons other than members and officers may be excluded from a special meeting if, in the opinion of the board, the public interest so requires it. These meetings are known as "in camera" meetings and should only be used when discussing legal matters, property acquisition, or personnel matters.[38]

Although the open meeting provisions in the *Community Charter* do not apply to improvement districts, they provide a useful guide for improvement districts to consider when developing bylaws. Establishing appropriate meeting procedures demonstrates an improvement district's commitment to openness, transparency and accountability.

[37] *Local Government Act, supra* Note 7, s 739.1.

[38] *Ministry of Community Services, Improvement District Manual* (BC: 2006), online: Ministry of Community, Sport and Social Development http://www.cscd.gov.bc.ca/lgd/gov_structure/library/improvement_district_manual.pdf .

CONCLUSION

Local governments across Canada are moving towards more open and transparent decision-making. The open meeting provisions in the *Community Charter* support open government by guaranteeing, with specified exceptions, that the public can attend meetings of local governments. Open meetings advance the democratic process by providing the public with an understanding of the considerations underlying local government actions and by allowing members of the public to observe the performance of their elected officials. They facilitate citizen participation in the policy development and decision-making processes and serve to build public trust and confidence in local government.

To assist local governments to follow appropriate practices in those specific and limited circumstances when they believe it is necessary to close a meeting, included on the following page is a CHECKLIST of what needs to be taken into account.

CHECKLIST

Before Closing Meetings	*Yes*	*No*
1. Has notice of this meeting been posted in advance on your website and other public locations?	☐	☐
2. Was the meeting agenda posted in advance with sufficient detail to enable members of the public to determine the matters to be discussed?	☐	☐
3. If this is a special meeting, did the notice include general information about matters to be discussed?	☐	☐
4. Is closure of this meeting necessary? [Use *Community Charter* paragraph 90(1)(n) to address any doubt.]	☐	☐
5. Is closure of this meeting authorized under section 90?	☐	☐
6. Does the resolution to close the meeting include:		
• a statement to the effect that the meeting will be closed?	☐	☐
• a description of the basis for closing the meeting including a description of each distinct matter to be discussed?	☐	☐
• the paragraph(s) under section 90 authorizing or requiring the closure of the meeting?	☐	☐
7. Was the resolution to close the meeting read aloud?	☐	☐

During Closed Meetings	*Yes*	*No*
8. Was discussion in closed meetings limited to the topics stated in the authorizing resolution?	☐	☐
9. Were no votes held on the reading or adoption of bylaws during a closed meeting?	☐	☐
10. Were minutes of the closed meeting recorded and retained?	☐	☐

After Closed Meetings	*Yes*	*No*
11. Will minutes and other records be reviewed and released once confidentiality is no longer required?	☐	☐

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